UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. CR15-5351RBJ**
	)	
vs.	)	
	)	
JAY MICHAUD,	)	
	)	
Defendant.	)	

MOTIONS HEARING & COURT'S ORAL RULING

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

May 25, 2016

APPEARANCES:

Keith Becker
U.S. Department of Justice Criminal Division
Matthew Hampton
Assistant United States Attorney
Representing the Plaintiff

Colin Fieman
Linda Sullivan
Federal Public Defender's Office
Representing the Defendant

10:00:04AM THE COURT: Good morning.

10:00:05AM MR. FIEMAN: Good morning, your Honor.

10:00:07AM THE COURT: This is further in the case of United States versus Michaud, No. 15-5351. I guess it technically comes on on the defendant's motion to dismiss the indictment that was found in Docket 178, but it really is, I think, a Rule 16 hearing on the question of what other appropriate relief the court should grant under the circumstances.

10:00:49AM Before we start, I want to correct something -- a couple of things in the plaintiff's submission, Docket No. 207. You indicated on Page 1 that the court declined to revisit its conclusion that the discovery was "properly withheld" -- "though properly withheld," is material. That is a misstatement. I did revisit it on the motion to reconsider.

10:01:37AM A similar thing is found in the footnote on Page 3. The statement is made, "The government respectfully requested that the court reconsider that portion of its ruling and the court declined to do so." That is not an accurate statement. I reconsidered that issue. As a matter of fact, I reconsidered it again in preparing for this hearing today. And the more I reconsider it, the more I find myself with the same ruling that I originally made regarding the materiality of the withheld

information. So be accurate in your briefing.

You also indicated on Page 4 that, "The court has appropriately considered the balance of these interests and determined that Michaud's asserted need for the information, even if material, does not overcome the government's and the public interest in nondisclosure." That balancing test is what we are about here. I have not engaged in that, except in preparation for this proceeding, and the balancing that needs to be done.

So with those corrections, we should commence with whatever argument you wish to make. And I guess, Mr. Fieman, you are the moving party here.

MR. FIEMAN: Your Honor, honestly, I don't know if I have anything much to add to the argument -- the rather lengthy argument made at the last hearing, which went into the dismissal issues and the issues of whether Mr. Michaud could get a fair trial.

THE COURT: I'm sorry?

MR. FIEMAN: I think I covered at the last hearing during my oral argument all of the issues regarding why we believe Mr. Michaud cannot get a fair trial.

The only analogy that I can really think of, because the technology is so new and so complicated, I -- The only thing I thought back to was when DNA was new on the horizon, and even things like the O.J. Simpson case. I

mean, those things turned on weeks of analysis and expert testimony, issues regarding authentication and lab processes, and they are very complicated. And we seem to be on the threshold of maybe similar new technology here.

I think the court has already made its findings about why we need it for all three stages, settlement discussions, pretrial motions, and, of course, trial. And anything -- You know, there is just new developments all the time. As indicated in our briefing, there was even new testimony last week in a separate proceeding, which, to me, even further muddied the waters, because we were relying on representations about how and where exactly certain data was seized. Now it looks like that has changed.

Your Honor, we believe that the case law is clear, that when legitimate governmental interests collide with a defendant's constitutional trial rights, the trial rights trump the government's interest, and dismissal is a straightforward remedy that we think we have given the court the Supreme Court authority and other authority to support that.

We proposed the Rule 16 exclusion alternative for the reasons I stated in my supplemental briefing. It may be a little bit more narrowly tailored. And we have no objection to the court excluding all fruits of the NIT as

10:05:28AM an alternative remedy. But short of that, I have no other
10:05:33AM suggestions to propose that would provide Mr. Michaud with
10:05:35AM a fair trial, your Honor.
10:05:37AM THE COURT: Thank you. Mr. Becker.
10:05:43AM MR. BECKER: Thank you, your Honor. First of all,
10:05:50AM with respect to the matters your Honor referenced in our
10:05:54AM briefing, I certainly apologize for giving the impression
10:05:58AM that the court, I guess, declined to reconsider. I think
10:06:02AM what we meant to suggest is that the court declined to
10:06:06AM reconsider its ultimate conclusion that the information
10:06:09AM was material. And so I apologize if we stated that
10:06:14AM clumsily and gave the impression of something otherwise.
10:06:17AM In response to the court's stated concerns in its
10:06:25AM order of trying to balance what is an important
10:06:28AM governmental and public interest in not disclosing this
10:06:31AM information with the defendant's interests in getting a
10:06:35AM fair trial, we have tried to present to the court a number
10:06:38AM of legal frameworks under which the court can conduct that
10:06:41AM sort of balancing. And from our view, under every one of
10:06:45AM those particular frameworks, dismissal of the entire
10:06:49AM indictment would be an excessive sanction to impose on the
10:06:52AM government in the context of this case.
10:06:55AM I just want to go through a couple of points with
10:06:58AM regard to those frameworks. First, with regard to the law
10:07:01AM enforcement privilege, the law enforcement privilege can

operate in order to allow for the nondisclosure of information even where it is material. If that weren't the case, then there wouldn't be a need for the law enforcement privilege at all, because the court could simply determine it's immaterial, it does not need to be disclosed under Rule 16.

And there are numerous examples of courts applying the law enforcement privilege to information, including identity of informants, including the location of an observation post, including detailed information about the government's surveillance equipment.

So we believe, certainly in light of the entirety of the facts here, and what the defense has available to them in order to conduct the sort of assessments that they can conduct, and assert the defenses that they wish to assert, that there are adequate alternative means to get at the same point.

And, therefore, the government, as the court has found, is legitimately and in good-faith withholding this information because of a compelling need. The defense has adequate alternatives. And under that analysis there is no sanction at all that would be required.

But understanding the court's interest in balancing the issue here, if there is going to be a sanction that is imposed it needs to be not greater than necessary in order

to remedy the articulated prejudice. And we certainly believe dismissal of the entire indictment would be excessive. And we have presented a number of intermediate steps the court could take in the context of the overall evidence in this case.

Normally, where information is withheld in discovery and not presented in discovery, the remedy would be the government doesn't get to present that evidence. And that's one possible remedy.

That's what the W.R. Grace case really stands for that the defense cites in their briefing. The government didn't disclose -- timely disclose witnesses. The court said you're not going to be able to present those witnesses, a proportional remedy to excluding the actual evidence that the government would have otherwise relied on. So that's a step the court can take.

And if the court decides to, the court could go further and say, government, you can't use the evidence you are not turning over, but you also can't use the evidence that the NIT derived, even what we have turned over to the defense, the NIT results which they have, the NIT code which they have, or even the information that came from the website itself, the Playpen website.

Count 2. Again, Count 2 is the count that depends on proof of the Playpen site and Pewter's activity. And the

court can decide that that would be an appropriate sanction, prevent the government from introducing that evidence.

As the declaration of Special Agent Mautz makes clear, Counts 1 and 3 are based on information found on the defendant's devices, not based on child pornography that he received from the Playpen website. It is independently derived. It doesn't rely on that sort of information.

THE COURT: Doesn't it all stem from the NIT, so to speak?

MR. BECKER: The NIT is ultimately what revealed the IP address that allowed law enforcement to obtain the search warrant for the defendant's home, that's true. But that would be -- to look at it under that vein would be a Wong Son fruit of the poisonous tree sort of rationale. Here, the court has found that the search warrant here was not unlawful, and has denied that motion, the motion to suppress. And so the Wong Son doctrine operates to --

THE COURT: If I recall correctly, I found that the search warrant was not appropriate, but the good faith exception allowed the admission of the evidence.

MR. BECKER: As well as your Honor did find a technical violation of Rule 41 that did not justify suppression. My point being, the Wong Son doctrine and the exclusionary rule operates to prevent the admission of

10:11:09AM unlawfully obtained evidence, and the court has found
10:11:11AM otherwise. So what we are dealing with here is a
10:11:13AM discovery issue about information to be presented at
10:11:16AM trial, and not an issue of unlawfully obtained evidence
10:11:21AM and the fruit of the poisonous tree. They are different
10:11:24AM analytical frameworks and they operate for different
10:11:26AM reasons. There is not unlawful law enforcement activity
10:11:30AM here that needs to be deterred, as the court has found,
10:11:32AM because the court found that suppression was
10:11:35AM inappropriate.

10:11:37AM In addition, there are other steps that the court can
10:11:40AM take in order to regulate the trial. Ordinarily if the
10:11:45AM court were to find that the balance here does tip in favor
10:11:48AM of the defense, that would argue -- under the framework of
10:11:52AM the lost or destroyed evidence law, that framework, that
10:11:56AM would argue for an adverse jury instruction, but not for
10:11:59AM dismissal of an entire indictment.

10:12:01AM THE COURT: You mentioned in your briefing a
10:12:04AM proposed jury instruction cure. What would that
10:12:11AM instruction say?

10:12:11AM MR. BECKER: The instruction could commemorate the
10:12:14AM court's order and the fact that the government -- the
10:12:16AM defense had requested further information, and the
10:12:19AM government had declined to provide it or has not provided
10:12:22AM it, and that the jury would be able to draw an adverse

10:12:28AM inference from the failure to produce that information.
10:12:30AM And that is normally what an adverse jury instruction
10:12:33AM would do, it would say, "This information was not
10:12:38AM provided, and you may draw some negative inference about
10:12:43AM the failure to provide it.
10:12:47AM I did also want to address, Judge, the concerns that
10:12:49AM the court has mentioned in its written order, as well as
10:12:52AM when we were here last time about the cases of
10:12:55AM Hernandez-Meza and Muniz-Jaquez. And this really goes to
10:13:03AM the defense's ability to evaluate their options at this
10:13:07AM stage in the game. And we understand that concern.
10:13:10AM But I think it is important to put those cases in
10:13:12AM their appropriate context. And that is that they involve
10:13:17AM a situation where the defense goes forward with a defense,
10:13:22AM and then at some point during trial a piece of evidence
10:13:25AM comes up that wasn't disclosed that could have changed the
10:13:28AM game, so to speak, and caused them to, if they had had it
10:13:32AM sooner, reevaluate whether they would have pled guilty or
10:13:36AM pursued a different defense, or gone to trial.
10:13:39AM Well, the court absolutely can manage those sorts of
10:13:42AM concerns now four months before trial. That's because,
10:13:45AM one, the evidence that the court has found the government
10:13:48AM has legitimately withheld is not going to be used as
10:13:52AM evidence at trial, and the court can absolutely prevent it
10:13:56AM from being used as evidence at trial simply by ordering

that to be the case. That means that the defense knows what is going to be admitted and what can't be admitted before trial, and so can evaluate their options about pleading or going to trial or about what defenses they wish to raise.

Again, the concern there in those cases was there was some sort of evidentiary trump card about which the defense was not aware, and then the court ultimately allowed the government to play that card, where it hadn't been disclosed previously. But the court can prevent that from happening here simply by excluding evidence and information that has not been provided, or even going further, if the court chooses, as we have suggested.

Not having this information, there is still -- We are not going -- We respect the court's materiality finding. Obviously we have disagreed with it, but it is the court's finding.

There is still an assessment, though, of what the prejudice is to the defense of not having the information that has been withheld.

And here, there is so much information that the defense has in order to be able to raise the sorts of defenses they indicate they wish to raise, whether that is a virus defense, a vulnerability defense, a possibility that some malicious actor put child pornography on their

computer. They've got all of the devices. They have five purported experts to analyze those and develop those sorts of issues. They have the ability to look at the devices, determine what the vulnerabilities are, see what's on there, run tests, see if there is viruses, and put in testimony, if the court admits it, to support the general possibilities that it is possible for someone to find a vulnerability on a computer and to put code on that computer or take action regarding that computer; or evidence that there are viruses, if they contend as much, that can put child pornography on a computer. They have already submitted to the court numerous declarations from purported experts in order to support that view. Presumably, if they can qualify those experts before your Honor, they would be able to present that sort of defense at trial if they wish to do so. And they've got that information in order to do that.

This comes back, again, to that first framework of do they have a means to get at the same point with the information that has been disclosed and what they have? And certainly the government's evidence is going to have to come from those devices that were seized from the defendant's home. That's what we have to analyze. And the court can make that absolutely clear through lesser sanctions than dismissing all of the charges in the entire

10:16:44AM indictment.

10:16:49AM One point that I wish to make as well, Judge, is about
10:16:52AM the materiality versus centrality. And we have
10:16:56AM highlighted this in our briefing as well with regard to
10:16:58AM the Budziac case. And that is that a finding of
10:17:02AM materiality regarding information to be disclosed does not
10:17:05AM necessarily make it central to the government's case. And
10:17:08AM that's something that we see in Budziac I and Budziac II,
10:17:12AM where the court goes through an analysis of was this
10:17:16AM information central to the charges that were presented at
10:17:19AM trial? And for the reasons that we put forth in the Mautz
10:17:23AM declaration, with respect to Counts 1 and 3, the
10:17:27AM information the court has found the government may
10:17:29AM withhold is simply tangential at best, and the court can
10:17:33AM make it absolutely tangential by just excluding that sort
10:17:36AM of evidence.

10:17:38AM The final point that I just wanted to make, your
10:17:44AM Honor, there was an implication in the defense filing
10:17:51AM regarding the defendant's personal laptop that was seized
10:17:55AM from his home. As we have advised the court previously,
10:17:59AM and as the court saw in the Mautz declaration, it had
10:18:02AM software on it that allowed a user to essentially wipe the
10:18:06AM computer. And the government's forensic analysis showed
10:18:10AM that the user of the computer activated that software the
10:18:13AM night before it was searched -- the night before his home

was searched by law enforcement. There was an implication in the defense filing that somehow the government was responsible for that, or had taken actions to fail to preserve evidence. There is no information whatsoever that the defense submits to substantiate that allegation. I just wanted to address it.

The defense has had the forensic report -- our forensic report for months in this case that indicated the existence of that software and that it was activated. And so I wanted to just strongly reject the implication that somehow the government was responsible for wiping the defendant's computer the day before we searched his home.

THE COURT: I gathered that the search warrant was issued on the basis of the information secured through the NIT. And when the search warrant was executed at Mr. Michaud's home, they picked up that computer that you are talking about now.

MR. BECKER: Yes.

THE COURT: And then they found that it was -- had been erased or wiped or whatever.

MR. BECKER: Correct.

THE COURT: Right? Okay.

MR. BECKER: Unless the court has questions, your Honor, that's all that I have.

THE COURT: I don't think so.

MR. BECKER: Thank you, your Honor.

THE COURT: Mr. Fieman.

MR. FIEMAN: Your Honor, I will be brief. I think the starting point is Mr. Becker's observation that there is a difference between materiality and centrality. His words were that this NIT evidence is not central to the government's case. That may be true, but the issue I think we are grappling with is its centrality to the defendant's case.

As we indicated in our briefings, we intend at trial at this point to put all of these issues in front of the jury. Do we know what the FBI's malware did? Did it insert photographs? Did it render it, as even Mozilla said, in a position where a third party can take total control? Sure, we can say those things to the jury. And if they get by objections, saying, well, they are speculation, or you don't have the evidence to support that, as we even saw at the suppression hearing, all we are invited to do is lead the jury to speculate about the heart of the defense case.

Now, sometimes speculation goes in a defendant's favor and sometimes it doesn't. But as I indicated, we are not looking for a trial based on speculation, we are looking for one based on facts, because we think we can find and shape our theory of the defense to one that is soundly

based on acquittal if we have the information.

This constant drumming on the location of where things are found, I can only think of an analogy. For example, in a homicide case you find DNA in the suspect's car, and then you find it later on a knife. And you say, well, carve out the DNA from the car because there are some evidentiary issues on that and we will just talk about the DNA on the knife. If the problem is the entire process for DNA analysis, whether the chain of custody on DNA is accurate, and the issues about how it got on the knife in the first place depends on expert testimony, that doesn't solve anything. It just invites more speculation.

Again, your Honor, also, it seems like we are back to dealing even with some pretrial suppression issues at this point, given the testimony that we got in Norfolk recently, which Mr. Becker did not even address. So we are kind of back where I started last week. We are almost, actually, a year into this case from the time of Mr. Michaud's initial appearance. I really have no confidence that I have covered the potential probable cause and even pretrial suppression issues, despite our intensive efforts to present everything to the court prior to our initial motion deadline. We are fast approaching trial. We have presented the court with five different specialists and experts who have explained in great deal

sort of the interlocking nature of all this evidence and its complexity. We have not had a true forensic expert response from the government.

Your Honor, unless there is something more I can provide the court in support, the only remedies -- the two options we presented as workable for us in terms of getting a fair trial, I don't know that there is anything else I can say at this point. I should just address your questions, if any.

THE COURT: Okay.

MR. FIEMAN: Thank you, your Honor.

THE COURT: I have done a good deal of work on this already. It won't take me long to put it all together. It could be an oral opinion. Stick around.

(Break.)

THE COURT: Well, what is the appropriate relief when the government properly withholds evidence that is material to the defendant's case? The answer to that question lies in part with just how material to the defendant's case is the evidence that has been withheld.

And to get to that question I think we have to start with some basics. The first basic thing that we have to consider is that the defendant is presumed innocent. That presumption remains with him, but he is accused of serious offenses, and those accusations trigger constitutional

protections.

There are three parts of the Bill of Rights, the amendments to the United States Constitution, that I think come into play here, and they are important. First is the Fourth Amendment, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." I think we can agree that, although at the time that was written there were no computers, computers should properly be considered part of the effects of people.

The second amendment that is important here is the Fifth Amendment that provides, "Nor be deprived of life, liberty, or property, without due process of law." And the procedures in criminal cases trigger due process, and that is an important consideration here.

I think also the Sixth Amendment comes into play. It indicates that the accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him. We have here a situation where the information withheld is the cause of the accusation against him, and he is not going to be confronted by that evidence.

The burden of proof is on the defendant to show the need here, and I think to show what relief is appropriate.

10:45:13AM But with all that basic law in mind, we must weigh the
10:45:18AM defendant's need for the evidence against the plaintiff's
10:45:24AM right to withhold it. And the law provides that that
10:45:28AM should be a balancing act.
10:45:35AM The case law, Jencks, and Roviario, and W.R. Grace
10:45:40AM particularly, but a lot of other cases as well, give us a
10:45:45AM list of considerations that the court should look at and
10:45:47AM consider in determining the proper relief. There are a
10:45:55AM lot of those. They are not all listed just in one place.
10:46:11AM These are considerations of what may be relevant to the
10:46:17AM prejudice that the defendant might experience.
10:46:23AM First is the centrality and importance of the
10:46:27AM evidence. It seems to me, based on the evidence in the
10:46:34AM record from expert witnesses here, that the subject
10:46:44AM evidence is central to the case, it's central to the
10:46:51AM search warrant that was issued, it's central to the proof
10:46:59AM that might be offered at trial, it is the background for
10:47:04AM the whole case.
10:47:08AM As I have indicated before, I have found the testimony
10:47:16AM or declarations from the plaintiff's experts -- I'm sorry,
10:47:22AM from the defendant's experts to be credible,
10:47:28AM Mr. Tsyrklevitch, Mr. Miller, Mr. Young, and Mr. Kasal,
10:47:34AM notably. I think the information from them basically
10:47:39AM overwhelms the evidence offered by the government in an
10:47:46AM attempt to counter those declarations.

10:47:53AM So on that first issue, it appears to me that this
10:47:59AM withheld evidence is central to the case and important not
10:48:05AM just to the defendant, but to both sides of the case.
10:48:11AM The second consideration is the probative value and
10:48:15AM reliability of secondary or substitute evidence. I am not
10:48:18AM aware of any secondary or substitute evidence that would
10:48:22AM meet the problems that are faced here.
10:48:28AM The third consideration is the nature and probable
10:48:33AM weight of the factual inferences, and the kinds of proof
10:48:39AM lost to the defendant.
10:48:45AM The evidence here, it seems to me, would have a
10:49:01AM presumptive inference of truth if offered by the
10:49:09AM government. Not the details of the NIT, but the fact of
10:49:15AM information received through the NIT.
10:49:22AM And in response to that the only answer for the
10:49:28AM defense is to put on some evidence, that they have lots
10:49:32AM of, that there may have been some error in the information
10:49:39AM that the NIT provided. They don't have the ability
10:49:45AM without the information to determine that there was an
10:49:49AM error, only that there may have been. And that, it seems
10:49:57AM to me, is a very difficult approach in a criminal case, to
10:50:09AM hope that they can raise some doubt based on the testimony
10:50:15AM of possible problems with the evidence.
10:50:19AM The fourth item in my list here is the probable effect
10:50:26AM on the jury from the absence of evidence. I think I have

10:50:31AM just commented on that.

10:50:40AM As I indicated, I think the discovery withheld
10:50:44AM implicates the defendant's constitutional rights. It is
10:50:54AM proposed that this information be withheld for trial as
10:50:56AM well as for the suppression hearing. I don't know of any
10:51:03AM other adequate alternative means to the same information.
10:51:12AM The government has argued, and the government's experts
10:51:15AM have argued, that the information that the defense has is
10:51:19AM sufficient, but that conclusion is belied by the expert
10:51:28AM testimony from the defense.

10:51:34AM Also, the court should consider whether the discovery
10:51:38AM was lost or destroyed while in the government's custody.
10:51:41AM That's not an issue here.

10:51:44AM Also, whether the government acted with disregard for
10:51:47AM the defendant's interests, or in bad faith, or for some
10:51:54AM tactical advantage. I think the government gets the
10:51:59AM benefit of the doubt on those things. They apparently
10:52:02AM acted in good faith in withholding this information and
10:52:08AM did not urge to withhold it just for some tactical
10:52:12AM advantage.

10:52:15AM I think those are the considerations that the court
10:52:28AM should consider and discuss in this matter.

10:52:37AM But you add to all of that another consideration, I
10:52:45AM guess, and that is that the warrant itself was
10:52:47AM questionable, as it was issued in violation of Federal

10:52:55AM Rule of Criminal Procedure 41.

10:53:02AM Under all of those circumstances, what can be done
10:53:05AM short of dismissal, if anything? The court should adopt
10:53:17AM the minimal appropriate relief rather than the maximum.
10:53:26AM The law teaches us that sanctions, if you want to call
10:53:31AM them that, or appropriate relief, should be the minimal
10:53:38AM rather than the maximum to reach the goal. It seems to me
10:53:46AM that the appropriate remedy here is to rule that the
10:53:50AM evidence of the NIT and the search warrant issued on the
10:53:56AM basis of the NIT should be suppressed, and the fruits of
10:54:00AM that search must also be suppressed. That's my ruling.

10:54:16AM I think it is appropriate to suppress the evidence
10:54:19AM rather than dismiss the case. I have not tried to analyze
10:54:24AM each count in terms of where the information came from to
10:54:29AM support that count. That's a matter that the government
10:54:38AM will have to consider further, as will the defense.

10:54:43AM Okay. Thank you.

10:54:47AM MR. FIEMAN: Thank you, your Honor.

10:54:48AM MR. BECKER: Thank you.

10:54:49AM MR. HAMPTON: Thank you.

(Proceedings concluded.)

C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

_____
/s/ Barry Fanning
Barry Fanning, Court Reporter